

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 489 of 2009

GATHITU MUTEGIAPPLICANT

V E R S U S

MWANGI RUKURURESPONDENT

R U L I N G

There is parcel of land number Loc.2/Kangari/1161 which is registered in the name of the Appellant and against which the Respondent lodged a caution on 4th July, 1988 claiming a purchaser's interest. The suit was filed at the Senior Resident Magistrate's Court at Kigumo for an order directing the Respondent to remove the caution. The Respondent claimed in defence that he filed the caution because the Appellant had in 1976 sold the land to him and consent of the Land Control Board obtained on 12th May, 1981 but that he had failed to transfer the same. It was pleaded that the Respondent had sued the Applicant in **Thika Pmcc. No. 398 of 1988** and obtained an order directing the Appellant to transfer the land to him. The Appellant appealed to the High Court in **HCCA No. 162 of 1993** at Nairobi but the appeal was dismissed. This is when he went to sue the Respondent at Kigumo. The court dismissed the Appellant's suit with costs but allowed with costs to the Respondent's counterclaim in which a declaration was sought that the Applicant was the purchaser in occupation who was entitled to have the land transferred to him. The other prayer granted was that the Land Registrar be directed to effect the transfer to the Respondent as owner in place of the Appellant.

The Appellant has preferred an appeal to this court, and in this application seeks stay of execution of the decree pending the hearing and determination of her appeal. The Application was presented by Mr. Mwangi and defended by Mrs. Kinyanjui. I consider their submissions.

The application was stated to be brought under **Orders 21 rule 22** and **9B rule 8** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Rules**. I agree with Mrs Kinyanjui that applications for stay of execution of decree where a party is appealing from the decision of the subordinate court are made under **Order 41 rule 4** of the **Civil Procedure Rules**. **Orders 21 rule 22** or **9B rule 8** have no relevance to the circumstances of this application. I also agree that the inherent powers of the court under **section 3A** of the **Civil Procedure Act** cannot be invoked where there is a specific statutory provision in the Act and Rules which would meet the necessities of the case. (**See INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION –VS- OTACHI [1975] EA 101**). The consequence is that the application is incompetent.

Even if the application was competent, the same was brought about 5 months after the judgment of the lower court and there was no attempt in the supporting affidavit to explain the delay. The dispute may be about land but the Applicant has not shown that he will suffer substantial loss if the application is not granted. Lastly, there has been no offer of security for the due performance of the decree that may ultimately be binding on him. The High Court's discretion to order a stay of execution under **Order 41 rule 4** is fettered by three conditions. First, the Applicant must establish that he will suffer substantial loss if the application is not granted, secondly, the Applicant must furnish security and, thirdly, the application must be made without unreasonable delay.

In conclusion, the application is dismissed with costs.

DATED AND SIGNED AT NAIROBI

THIS 15TH DAY OF MARCH, 2010

A. O. MUCHELULE

J U D G E